

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A PERMIT
TO APPROPRIATE PUBLIC GROUND
WATER APPROVED BY
DEPARTMENT OF ECOLOGY FOR
ISSUANCE TO BERT O. YOSTING,
MR. & MRS. WILLARD KARL, JR.,
and THOMAS LEAHY,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,
and BERT O. YOSTING,

Respondents.

PCHB No. 81-19

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of Department of Ecology's approval of an application to appropriate public ground water, came on for hearing before the Pollution Control Hearings Board, David Akana and Gayle Rothrock, Members, convened at Mount Vernon, Washington on June 4, 1981. William A. Harrison, Administrative Law Judge, presided.

1 Respondent elected a formal hearing pursuant to RCW 43.21B.230.

2 Appellants Willard Karl, Jr., and Thomas Leahy appeared and
3 represented themselves. Respondent Department of Ecology appeared by
4 Wick Dufford, Assistant Attorney General. Respondent Bert O. Yosting
5 appeared and represented himself. Reporter Carolyn Koinzan recorded
6 the proceedings.

7 Witnesses were sworn and testified. Exhibits were examined. From
8 testimony heard and exhibits examined, the Board makes these

9 FINDINGS OF FACT

10 I

11 Appellants, Messrs. Karl and Leahy, own or have interest in a
12 house and land in Concrete. Their neighbor, Bert O. Yosting owns and
13 operates a site for mobile homes and recreational vehicles. Because
14 in the past the two ownerships were one, a single well serves both the
15 Karl home and the Yosting mobile home site. The well is located on
16 the Karl parcel with certain rights of access claimed by Yosting.

17 II

18 Prior to the facts of this case there had never been an
19 application for a permit to appropriate water made to the state in
20 connection with the subject well.

21 III

22 Karl uses water from the well for single domestic and
23 stockwatering purposes. Yosting now uses water from the well for a
24 general store, 11 mobile home sites and 32 recreational vehicle sites.

25
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1 IV

2 Karl and Yosting have evenly shared the cost of pumps and repairs
3 in the past.

4 V

5 On April 28, 1978, Yosting applied to respondent State Department
6 of Ecology (DOE) for a permit to appropriate public groundwater from
7 the well in question. That application sought water for 30 mobile
8 home sites and 30 recreational vehicle sites. The proposed
9 appropriation would likely require larger pumping equipment.

10 VI

11 On January 21, 1981, DOE issued its order approving the Yosting
12 application to appropriate water up to 125 gallons per minute and not
13 to exceed 30.3 acre feet per year. From that order, appellants
14 appealed. DOE's inspector had conducted a field investigation on June
15 3, 1980, during which he spoke with an unknown individual whose
16 identity he did not verify. Consequently that persons's remarks were
17 mis-characterized as those of appellant, Karl, in the Report of
18 Examination supporting DOE's January 21, 1981 order.

19 Subsequently DOE drew up a replacement Report of Examination
20 reaching the same conclusion but clarifying both the discussion with
21 the unknown person and the priority of rights with respect to the
22 instant withdrawal from the well. Appellant's appeal from this
23 decision also.

VII

Although DOE did not notify Karl of its field investigation, both Reports of Examination were ultimately received by appellants in time to prepare their appeal to this Board. There was no prejudice resulting from this procedure.

VIII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The water to be withdrawn from the well in question is public ground water. RCW 90.44.035 and .040. As such, the right to appropriate it is determined by chapter 90.44 RCW.

II

By reference in RCW 90.44.060 the criteria for issuance of a permit to appropriate public ground water includes:

1. water is available for appropriation
2. water is to be put to a beneficial use
3. and the appropriation will not impair existing rights
4. the appropriation will not be detrimental to the public welfare. See RCW 90.03.290.

The mobile home and recreational vehicle use proposed by Yosting is a beneficial use. Notwithstanding that a larger pump may be required, water is available for the appropriation Yosting requested. That

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1 appropriation will not impair existing rights. The appropriation will
2 not be detrimental to the public welfare.

3 III

4 Appellant, Karl's, belief that he and Yosting should be entitled
5 to appropriate equal amounts of ground water is not born out by the
6 facts of this case. Yosting is entitled to the greater appropriation
7 for which he applied under our system that first in time is first in
8 right. RCW 90.44.020 and RCW 90.03.010.

9 However, at the completion of the construction schedule contained
10 in Yosting's permit (one year), Yosting must show:

11 ...that construction has been completed in
12 compliance with the terms of any permit...
RCW 90.44.080.

13 If Yosting has neither the use (mobile home sites) nor pumping
14 capacity called for in his permit, no certificate can be properly
15 issued for the unperfected appropriation. RCW 90.44.080 above.

16 IV

17 Appellant, Karl, now has the benefit of RCW 90.44.050 which allows
18 appropriation of the type he is making without any application to
19 DOE. Karl may also make application for any additional appropriation
20 for which he may have beneficial use.

21 V

22 Neither the allegations concerning private right of access to the
23 well nor approvals to be acted upon by the State Department of Social
24 and Health Services are within the jurisdiction of this Board in this
25 matter.

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VI

In summary, appellant's have not proven that DOE's approval was inconsistent with the criteria for issuance of a permit to appropriate public ground water. The DOE approval should therefore be affirmed.

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The order of the Department of Ecology approving application No. G1-23091 for appropriation of public ground water is hereby affirmed.

DATED this 10th day of July, 1981.

POLLUTION CONTROL HEARINGS BOARD



DAVID AKANA, Member



GAYLE ROTHROCK, Member